

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 65 CS Residential Foreclosure Proceedings
SPONSOR(S): Porth; Kottkamp
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 166

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|------------------------|------------------|----------------|
| 1) <u>Civil Justice Committee</u> | <u>7 Y, 0 N, w/CS</u> | <u>Bond</u> | <u>Bond</u> |
| 2) <u>Economic Development, Trade & Banking Committee</u> | <u>13 Y, 0 N, w/CS</u> | <u>Olmedillo</u> | <u>Carlson</u> |
| 3) <u>Justice Appropriations Committee</u> | <u></u> | <u></u> | <u></u> |
| 4) <u>Justice Council</u> | <u></u> | <u></u> | <u></u> |
| 5) <u></u> | <u></u> | <u></u> | <u></u> |

SUMMARY ANALYSIS

Foreclosure is the legal process for enforcing a lien or mortgage encumbering real property. The foreclosure process results in a forced sale of the property. In some foreclosure cases, the sale price exceeds the amount owed to pay off the lien or mortgage. In such cases, the former property owner may be entitled to proceeds from the sale. Current law does not provide a procedure for distribution of that surplus to the former property owner, requiring the former owner to file court papers to obtain a court order directing the clerk to pay the surplus to the former owner.

This bill creates a legal presumption that the former owner of the property is entitled to the surplus after payment of subordinate lienholders who timely filed their claim. It requires the clerk of court to mail a copy of the final judgment rendered in a foreclosure proceeding to every party to the action, including parties in default. The final judgment must include notice of potential surplus.

This bill also requires that certain disclosures be made before a court will honor a transfer or assignment of the surplus. This bill also provides that it is deceptive and unfair trade practice to victimize a person whose home is in foreclosure, creating a civil cause of action.

This bill creates service fees payable to the clerk of court and the surplus trustee related to foreclosure surplus, and increases costs to clerks related to the activities for which the fees are charged. This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill complicates foreclosure actions, and creates a new cause of action.

Ensure Lower Taxes -- This bill creates new fees.

Promote Personal Responsibility -- This bill increases personal responsibility for injurious behavior by creating a cause of action for deceptive and unfair trade practices.

B. EFFECT OF PROPOSED CHANGES:

Background

Foreclosure is the legal process for enforcement of a security interest in real property. Subject to the owner's right to redemption¹, property subject to foreclosure is sold and the proceeds of the sale are applied against the debt. In most foreclosures, the debt exceeds the net proceeds of the sale.² However, due to recent economic forces that have led to substantial inflation in real property values, a growing number of properties are being sold at foreclosure for more than the debt owed on the property. The proceeds of a sale in excess of the debt owed is referred to as the surplus from the sale. In general, the property owner is entitled to the surplus.

A property owner facing foreclosure can seek help from numerous sources. The property owner can negotiate with the foreclosing lender. A different lender may be willing to refinance the property, or offer a second mortgage. The property owner can seek bankruptcy protection. The property owner can sell the property prior to the foreclosure sale. The property owner can borrow from friends and family. Most foreclosure cases are resolved by agreement or redemption of the property.

It has been reported that, with the growing number of foreclosures that may result in a surplus, there is a growing number of entrepreneurs who are offering services to property owners subject to foreclosure. Some of these entrepreneurs are receiving significant profits while the property owners they contract with receive little of their equity in the property. Some of the common means are:

- A lawyer, or a person claiming to be a lawyer, will offer to file the legal papers required to obtain the court order required for the clerk to distribute the surplus to the now (or soon to be) former property owner. The fee arrangement may be a contingency fee. The property owner does not realize that the paperwork is basic enough that most lay persons could easily complete it.³
- The entrepreneur offers the property owner a small sum of cash in exchange for an assignment of the surplus.

¹ Redemption is the right of any property owner to pay the debt at any time prior to the sale, and thereby stop the sale and keep the property. See generally, s. 45.0315, F.S.

² Where the debt exceeds the sale proceeds, the lender can usually sue for the difference, known as a deficiency. See generally s. 702.06, F.S.

³ In a related scheme, the Florida Bar has suspended the license of an attorney who was allegedly filing the paperwork necessary to obtain the surplus funds, but without receiving the owner's authority. The lawyer would deduct a 40% fee from the proceeds, and prepare a check payable to the former owner for the remainder. In some cases, the partners would intercept and cash the owner's check. Daily Business Review, *South Florida lawyer accused in mortgage scam is suspended*, Vol. 46, No. 45 (Feb. 11, 2005).

- The entrepreneur offers the property owner a small sum of cash for a quitclaim deed to the property, thereby obtaining the legal right to the surplus.

The procedure for judicial foreclosure sales is set forth in s. 45.031, F.S. The section does not specify how the clerk is to handle a surplus, thus requiring a court order for distribution of the surplus. The section also does not restrict any sale or transfer of the real property, or the right to the surplus, prior to foreclosure.

Effect of Bill

Disbursement of Surplus Funds

This bill creates s. 45.032, to provide for disbursement of surplus funds after a judicial foreclosure sale. The bill creates a rebuttable legal presumption that the owner of the property that was foreclosed, as of the date of the filing of the lis pendens, is entitled to the surplus funds unless some other person proves entitlement to the funds. The bill provides a method to rebut the presumption. In addition, the bill specifically states that the legislature intends to abrogate the common law rule that surplus proceeds in a foreclosure case are the property of the owner on the date of the foreclosure sale.

The bill requires the clerk to furnish a copy of the final judgment to every party in the action or to their attorney of record. The final judgment shall provide certain language including a notice of potential surplus, a statement indicating that a subordinate lienholder must file a claim for surplus funds no later than 60 days after the sale, a statement indicating that the property owner does not need to assign his or her rights in the property to claim surplus funds, and a statement indicating that the owner does not need any type of representation to claim such funds.

The bill requires that the publication of sale, which includes the time and place of the sale, now include language stating that any person claiming an interest in the surplus fund must file such claim within 60 days of the date of the sale. The sale of the foreclosed property must be conducted at the time and place indicated in the final judgment.

The clerk continues to be responsible to serve a copy of the Certificate of Sale and Certificate of Title on each party to the action; however, the clerk must now also serve parties in default, and include the dollar amount of the sale. The disbursement and available surplus amounts now must be included in the Certificate of Disbursement. In addition, the Certificate of Disbursement must state that any person, other than the rightful owner, must file a claim to surplus funds within 60 days after the sale for such claim to be valid.

The clerk shall hold the surplus funds 60 days after issuance of the Certificate of Disbursement, pending a court order. In the event no one files a claim within 60 days, the clerk shall contact the Florida Clerks of Court Operations Corporation (CCOC) for appointment of a Surplus Trustee (Trustee), which shall make an appointment within 10 days. Upon such assignment, the clerk shall furnish the Trustee a copy of a Notice of Appointment of Surplus Trustee, which must include the amount of available surplus.

The bill allows the Trustee one year from the date of appointment to locate the property owner. If after such time the Trustee fails to locate the property owner, the clerk shall terminate the appointment and shall treat the remaining surplus funds as unclaimed property to be deposited with the Chief Financial Officer 30 days after such termination.

Any person other than the owner of record who claims the surplus funds has the burden of proving that he or she is entitled to some or all of the surplus funds. The court must consider the factors in s. 45.033, created by this bill, when hearing a claim that a person other than the owner of record is entitled to the surplus funds.

The clerk must use the proceeds of such fee solely for purposes of educating the public as to the rights of homeowners regarding foreclosure proceedings.

Transfer or Assignment of Right to Surplus Funds

This bill creates s. 45.033, to provide criteria for determining whether a sale or assignment of the right to surplus proceeds in a property subject to foreclosure is a valid sale or assignment. The bill creates a rebuttable presumption that the owner of real property as of the date of the filing of a lis pendens is entitled to surplus funds available in a foreclosure of that real property after payment of subordinate lienholders who have timely filed a claim. Another person may rebut that presumption only by proving that:

- The grantee or assignee is a grantee or assignee by virtue of an involuntary transfer or assignment of the right to collect the surplus. An involuntary transfer or assignment may be as a result of inheritance or as a result of the appointment of a guardian.
- A voluntary transfer or assignment shall be a transfer or assignment qualified under this subsection if:
 - The transfer or assignment is in writing, and the instrument:
 - If the instrument was executed prior to the foreclosure sale, the instrument includes a financial disclosure that specifies the assessed value of the property, a statement that the assessed value may be lower than the actual value of the property, the approximate amount of any debt encumbering the property, and the approximate amount of any equity in the property. If the instrument was executed after the foreclosure sale, the instrument must also specify the foreclosure sale price and the amount of the surplus.
 - Includes a statement that the owner does not need an attorney or other representative to recover surplus funds in a foreclosure.
 - Specifies all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.
 - The transfer or assignment is filed with the court on or before 60 days after the filing of the Certificate of Disbursements.
 - There are funds available to pay the transfer or assignment after payment of timely filed claims of subordinate lienholders.
 - The transferor or assignee is qualified as a surplus trustee, or could qualify as a surplus trustee, pursuant to s. 45.034.

A transfer or assignment that does not follow these requirements may nevertheless be allowed by the court if the court finds that the instrument was procured in good faith and with no intent to defraud the former owner.

A person who has executed a transfer or assignment that does not conform to the requirements of this section has the right to petition the court presiding over the foreclosure proceeding to set aside the nonconforming transfer or assignment. If the transfer or assignment is set aside, the owner of record will be entitled to the surplus funds after payment of timely filed claims by subordinate lienholders; but the other party may, in a separate proceeding, seek rescission of contract and appropriate damages therein.

The provisions regarding the requirements of an assignment or transfer of the right to collect surplus funds do not apply to a deed, a mortgage, or a deed in lieu of foreclosure, unless a person other than the owner of record is claiming that a deed or mortgage entitles the person to surplus proceeds. Nothing in this section shall affect the title or marketability of the real property that is the subject of the deed or other instrument. The provisions regarding the requirements of an assignment or transfer of the right to collect surplus funds do not affect the validity of a lien evidenced by a mortgage.

Surplus Trustee (Trustee)

The bill authorizes a surplus trustee to locate the owner of surplus funds under certain circumstances. The trustee must apply for certification with CCOC. Subsequently, CCOC must certify an applicant that qualifies under the requirements of s. 45.034. for one calendar year.

The primary duty of a surplus trustee is to locate the owner of record within one year of appointment. An application for certification must include the following:

- The name and address of the entity and one or more of its principals;
- A certificate of good standing from the Florida Secretary of State indicating that the entity is a Florida entity;
- A statement under oath by a principal certifying that the entity, or a principal of the entity, has a minimum of 12 months experience in the recovery of surplus funds in foreclosure actions;
- Proof that the entity holds a valid Class "A" private investigators license;
- Proof that the entity carries a minimum of \$500,000 in liability insurance, cash reserves or bonding;
- A statement from an attorney licensed to practice in Florida certifying that the attorney is a principal of the entity or is employed by the entity on a full-time basis, and that the attorney will supervise the management of the entity;
- A statement under oath by a principal that he or she understands his or her duty to immediately notify CCOC of the entity's failure to continue to qualify under the relevant statute; and
- A non-refundable fee of \$25.

A Trustee may renew its qualification by providing CCOC a \$25 renewal fee and a statement under oath as to its continued qualification under s. 45.035

The CCOC shall develop a rotation system for appointment of Trustees upon notification, by the clerk, of available surplus.

The bill authorizes the Trustee to collect service fees, payable from surplus funds, related to its duties.

Deceptive and Unfair Trade Practices Related to Surplus Funds

This bill creates s. 501.2078, within the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).⁴ The FDUTPA creates a number of civil causes of action by which a state attorney, or the Attorney General, may seek injunctive relief, an injunction, and a civil penalty against a person engaging in a deceptive or unfair trade practice. The FDUTPA also creates a civil cause of action by which a person harmed by a deceptive or unfair trade practice may seek a civil judgment against the a person engaging in a deceptive and unfair trade practice.⁵

This bill provides that deceptive and unfair trade practices occurring in a foreclosure proceeding of a homeowner may give rise to a civil cause of action under FDUPTA. The bill also defines "homeowner". The foreclosure must be a "residential foreclosure proceeding", defined as "any action in a circuit court of this state in which a party seeks to foreclose on a mortgage encumbering the mortgagor's primary dwelling."

This bill provides that any person, other than a financial institution as defined by s. 655.005, F.S.,⁶ who willfully uses, or has willfully used, a method, act, or practice in violation of FDUPTA, which method,

⁴ See Part II of ch. 501, F.S.

⁵ Section 501.211, F.S.

⁶ Section 655.005(1)(h), F.S., defines "financial institution" as "a state or federal association, bank, savings bank, trust company, international bank agency, international branch, representative office or international administrative office, or credit union."

act, or practice victimizes or attempts to victimize homeowners during the course of a residential foreclosure proceeding, and in committing such violation knew or should have known that such conduct was unfair or deceptive, is liable for a civil penalty of not more than \$15,000 for each such violation.

Restitution or reimbursement to a homeowner is to be paid first, before payment of any civil penalty. Civil penalties collected are deposited into the Legal Affairs Revolving Trust Fund of the Department of Legal Affairs and allocated solely to the Department of Legal Affairs for "the purpose of preparing and distributing consumer education materials, programs, and seminars to benefit homeowners in residential foreclosure proceedings or to further enforcement efforts."

This bill provides that the following do not constitute grounds for suite under this section of FDUPTA:

- The act of encumbering the dwelling subject to a residential foreclosure proceeding with a substitute or additional lien.
- A deed in lieu of foreclosure, a workout agreement, a bankruptcy plan, or any other agreement between a foreclosing lender and a homeowner.
- Any action taken by a lender, mortgage broker, assignee of a mortgage, or counsel for any such entity, in foreclosing a mortgage or collecting on the note.

Legal Notice Concerning Foreclosure Proceedings.

The prevailing party in any civil action may be entitled to reimbursement of court costs from a non-prevailing party. This bill limits an award of costs for a legal advertisement, publication, or notice relating to a foreclosure proceeding to the actual costs charged by the newspaper for the advertisement, publication or notice.

Fees

This bill authorizes the clerk to take the following deductions from surplus funds:

- A service charge of up to \$60 for making, recording and certifying the sale and title.
- A \$25 fee to be used for the purposes of educating the public regarding foreclosure proceedings.
- A \$10 fee to notify surplus trustees of surplus funds.
- A \$10 fee for each disbursement of surplus.
- A \$10 fee to contact the Florida Clerks of Court Operations for assignment of a case to a surplus trustee.
- A \$10 fee to furnish surplus trustee a copy of a final judgment.
- A \$10 fee to furnish the surplus trustee with a certificate of disbursement.
- A \$10 fee to disburse trustees their cost in advance.

Moreover, the bill provides that a surplus trustee is entitled to a 2% service fee upon notice of appointment and a 10% service charge upon obtaining the order disbursing surplus funds to the owner, which costs are related to the proper payment of the surplus funds.

C. SECTION DIRECTORY:

Section 1 amends s. 45.031, F.S., relating to notice of surplus funds.

Section 2 creates s. 45.032, F.S., providing for distribution of surplus funds.

Section 3 creates s. 45.033, F.S., providing criteria for determination of a valid transfer or assignment of the right to collect surplus funds.

Section 4 creates s. 45.034, F.S., providing qualification and appointment criteria for surplus trustee.

Section 5 creates s. 45.035, F.S., providing for clerks fees.

Section 6 creates s. 501.2078, F.S., to provide that victimization of a homeowner involved in a foreclosure action may be a violation of the Florida Deceptive and Unfair Trade Practices Act.

Section 7 amends s. 702.035, F.S., to limit taxable costs chargeable in a foreclosure action.

Section 8 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

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- A \$10 fee to contact the Florida Clerks of Court Operations for assignment of a case to a surplus trustee.
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III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 11, 2006, the Civil Justice Committee adopted one "remove everything after the enactment clause" amendment. The amendment:

- Removed the notification that was to be attached to every summons served in a foreclosure action.
- Removed the prohibition on contacting persons subject to foreclosure.
- Created a presumption that the owner of record as of the date of the lis pendens is the person entitled to payment of the surplus, unless another person proves his or her right to claim the surplus.
- Created fees for the clerk of court.
- Provided that the clerk can distribute the surplus to the former owner if no other person objects.
- Removed limitations on property transfers that would likely have impacted all real estate closings.

The bill was then reported favorably with a committee substitute.

On March 23, 2006, the Economic Development Trade and Banking Committee adopted a "remove everything after the enactment clause" amendment. This amendment makes the following changes:

- It requires the final judgment rendered in a foreclosure proceeding to include information regarding notice of potential surplus, place and time of sale, and claim filing deadlines.
- It requires the clerk to mail a copy of the final judgment to every party or attorney of record in the action.
- It requires that a statement be placed in a publication of sale indicating that a person must file a claim for surplus funds within 60 days after the clerk issues the Certificate of Title.
- It requires that the certificate of sale include the purchase price.
- It requires certain information in a certificate of disbursement, including filing deadlines, disbursement and surplus amounts.
- It creates a rebuttable presumption that the owner is the owner of the property as of the time a lis pendens is filed and provides a method to rebut the presumption.
- It requires certain disclosures for a voluntary transfer or assignment of rights to be valid.
- It specifies that the legislature abrogates the common law rule that surplus proceeds in a foreclosure case are the property of the owner on the date of the foreclosure sale.
- It requires the clerk to hold the surplus funds for 60 days after issuing the certificate of disbursement, pending a court order.
- It provides that the court shall set an evidentiary hearing to determine entitlement to surplus if claims were filed.

- It removes the requirement that the clerk provide notice to certain persons regarding availability of surplus funds.
- It amends the procedure by which the clerk should locate the property owner when surplus remains, and it provides that after 60 days, the clerk must appoint a surplus trustee to locate the owner.
- It creates qualifications and appointment procedures for surplus trustees in foreclosure actions, including the requirement that a trustee apply for certification with the Florida Clerk of Court Operations Corporation.
- It provides that a trustee has one year to locate the property owner. Thereafter, the clerk shall terminate the appointment and after 30 days of such termination, surplus funds shall be treated as unclaimed property to be deposited with the Chief Financial Officer.
- It specifies that proceedings regarding surplus funds do not affect or cloud title to the property.
- Provides that trustee may employ subcontractors who are not qualified as surplus trustees.
- Fees:

This bill authorizes the clerk to take the following deductions from surplus funds:

- A service charge of up to \$60 for making, recording and certifying the sale and title.
- A \$25 fee to be used for the purposes of educating the public regarding foreclosure proceedings.
- A \$10 fee to notify surplus trustees of surplus funds.
- A \$10 fee for each disbursement of surplus.
- A \$10 fee to contact the Florida Clerks of Court Operations for assignment of a case to a surplus trustee.
- A \$10 fee to furnish surplus trustee a copy of a final judgment.
- A \$10 fee to furnish the surplus trustee with a certificate of disbursement.
- A \$10 fee to disburse trustees their cost in advance.

Moreover, the bill provides that a surplus trustee is entitled to a 2% service fee upon notice of appointment and a 10% service charge upon obtaining the order disbursing surplus funds to the owner, which costs are related to the proper payment of the surplus funds.